SUPREME COURT, U.S.
FILED
APR. 20
OFFICE OF THE CLERK

No. 97-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARY ELDON ALVORD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Wm. J. Sheppard, Esquire
COUNSEL OF RECORD
D. Gray Thomas, Esquire
Elizabeth L. White, Esquire
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
COUNSEL FOR PETITIONER

April 17, 1998

ARGUMENT

Respondent's arguments in opposition to the Petition for Certiorari are mistaken and misleading. This case presents actual and substantial federal constitutional questions of great importance as to capital sentencings, and the decision below conflicts with clear constitutional standards enunciated by the Court. Review, therefore, is warranted.

1. No adequate independent state law grounds asserted by the court below can be determined to exist unless the substance of petitioner's constitutional claims constitutes an inadequate basis for relief on the merits. The merits of petitioner's federal constitutional claims must be determined in order to ascertain whether the asserted state law procedural bar even applies. The Florida Supreme Court's determination of a procedural bar is error unless petitioner's claims under *Hitchcock v. Dugger,* 481 U.S. 393 (1987), are materially identical to those raised previously. The Petition for Writ for Certiorari, and the dissent below,

demonstrate the substantial differences between the current and previous *Hitchcock* issues.

As a matter of legal platitude, respondent is correct that decisions of state courts resting on adequate and independent state law grounds are not subject to review by the Court for federal constitutional error. However, the invocation by the Florida Supreme Court of a state law procedural bar was based solely upon that court's evaluations of whether the non-record *Hitchcock* evidence proffered by petitioner was essentially the same as the record *Hitchcock* evidence previously considered by the court below. The previous proceeding was an original habeas corpus petition filed in the Florida Supreme Court, which at that time considered only mitigating evidence that was actually in the trial record. *Alvord v. State,* 694 So.2d 704, 705 (Fla. 1997).

Ultimately, this means that no adequate and independent state law ground exists to preclude review by

the Court unless the proffered non-record mitigating evidence is insufficient to overcome the constitutional harmlessness standard found in a 1989 decision on the basis only of evidence in the trial record. *See Alvord v. Dugger*, 541 So.2d 598, 599-600 (1989). In other words, the merits of petitioner's non-record *Hitchcock* claim must be ascertained, and no adequate and independent state law grounds exist to preclude review unless the acknowledged *Hitchcock* error can be found constitutionally harmless in light of the proffered non-record mitigating evidence. As set forth in the petition, no harmlessness finding can be applied in this case.

2. In 1987, petitioner did not request an evidentiary hearing as to error under *Hitchcock v. Dugger*, 481 U.S. 393 (1987), insofar as the Florida procedural vehicle appropriate at that time was an original petition for writ of habeas corpus in the Florida Supreme Court (which conducts no evidentiary hearings) until that court's

subsequent decision in *Hall v. State,* 541 So.,2d 1125 (Fla. 1989), which directed future applicants to proceed otherwise. Respondent raises a straw issue regarding petitioner's 1987 petition in the Florida Supreme Court. Brief in Opposition at 14. That original petition was filed promptly after this Court's decision in *Hitchcock, supra.* At that time, an original petition for habeas corpus in the Florida Supreme Court was an appropriate vehicle for the challenge raised. The Florida Supreme Court denied habeas corpus relief on February 9,1989. *Alvord v. Dugger,* 541 So.2d 598 (Fla. 1989).

Subsequently, that court decided in *Hall v. State,* 541 So.2d 1125, 1128 (1989), that *Hitchcock* claims raised after *Hall* would not be considered on original habeas petitions to that court, but rather must be presented to trial courts on motions for post-conviction relief under Fla.R.Crim.P. 3.850. Alvord's original habeas petition in the court below in 1987 could not request an evidentiary

hearing because such hearings are not among the functions of that court. *See, e.g., Hall,* 541 So.2d at 1128. Petitioner therefore cannot be faulted for following Florida procedural law in effect at the time of his 1987 original habeas corpus petition in the Florida Supreme Court and contending at that time that the decision in *Hitchcock,* as a matter of law, simply invalidated death sentences imposed under the unconstitutional strictures of Florida law at the time of petitioner's trial in 1974. Respondent's contentions to the contrary are simply disingenuous.

3. Respondent ignores that both Florida law at the time of petitioner's 1974 trial, and the instructions actually given to the jury during the penalty phase in petitioner's trial, affirmatively foreclosed consideration of non-statutory mitigating evidence by both the advisory jury and the sentencing judge. One of the primary authorities upon which respondent relies clearly demonstrates the appropriateness of review in this case, as well as the

constitutional error by the court below. *See* Brief in Opposition at 30-34. In *Buchanan v. Angelone*, 522 U.S. ___, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), while distinguishing between the eligibility phase and selection phase of a capital sentencing proceeding, the Court restated the established selection-phase rule that the states cannot constitutionally preclude the capital sentencer from considering any relevant mitigating evidence. *Id.* at ___, 118 S.Ct. at ___, 139 L.Ed.2d at 109-10.

As a matter of Florida law at the time of petitioner's 1974 trial, § 921.141, Fla. Stat. (1973), and under the instructions actually given to the advisory jury in this case, (Tr. 992-93, Pet. App. 380a-382a), the capital sentencer was affirmatively precluded from considering in any manner any mitigating evidence directed to factors other than those specifically enumerated in Florida law. The trial court, the jury, the prosecution and the defense at that time complied with that unconstitutional restriction,

precluding nonstatutory mitigation. As a result, the standards enunciated in *Buchanan* require that petitioner's sentence of death be vacated, and so review on certiorari is warranted in this case.

4. Substantial federal questions of public importance exist in determining the effect of undisputed *Hitchcock* error in cases tried under a clearly unconstitutional regime prior to the court's decisions in *Hitchcock, supra; Skipper v. South Carolina,* 476 U.S. 1 (1986); *Eddings v. Oklahoma,* 455 U.S. 104 (1982); and *Lockett v. Ohio,* 438 U.S. 586 (1978). Additionally, certiorari is appropriate in a capital case even where the Court must consider the facts of the case in order to discern its important constitutional merits. *See Kyles v. Whitley,* 514 U.S. ___, ___, 115 S.Ct. 1555, ___, 131 L.Ed.2d 490, 519 (1995) (Stevens, J., concurring).

As respondent concedes, Brief in Opposition at 12, the matters raised in the petition in this case turn on

the existence of admitted *Hitchcock* error in petitioner's trial. The issues raised in the petition in this case constitute federal questions of continuing substantial importance in capital cases, warranting review by the Court. Denial of certiorari is not warranted merely because resolution of such a substantial and important federal question involves consideration of the factual circumstances of an individual case. *See, e.g., Kyles, supra.* Review in this case is warranted on the basis of the real, substantial and important federal constitutional questions presented, and the erroneous constitutional construction below.

The existence of substantial federal questions resolved below contrary to the clear constitutional standards enunciated by this Court for application to capital sentencing proceedings clearly warrants review on certiorari. Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

Wm. J. Sheppard, Esquire
Counsel of Record
D. Gray Thomas, Esquire
Elizabeth L. White, Esquire
Sheppard and White, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

Counsel for Petitioner

Date: April 17, 1998